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Civil Procedure

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the right to appeal from a judgment which reversed and vacated the board's decision. The court pointed out that a township board of zoning appeals is a statutory board deriving its power from Sections 3180-37' to 3180-39 of the Ohio General Code, inclusive, and that those statutes contain no language expressly conferring upon the board any right to appeal from a judgment of a court or even to participate as a party in an appeal from one of its decisions.¹⁸

Criminal Appellate Procedure

As usual, a number of criminal appeals were considered by the Ohio Supreme Court and the courts of appeals during the year. However, only one seemed to be worthy of special mention because of its procedural aspects. In this case, *State v. Thersen*,¹⁹ the defendant was committed to the Lima State Hospital for examination and report for a period of not more than sixty days in conformity with Section 13451-20 of the Ohio General Code. This commitment was made after conviction but before sentence, and the defendant filed an appeal on questions of law from the commitment order. The state moved to dismiss the appeal on the ground that it was not taken from a judgment or after sentence on the judgment. The court of appeals overruled the motion to dismiss and, although no exact precedent for its action could be found, held that the order of reference made after conviction but before sentence was incident to the final imposition of sentence; and, therefore, being part and parcel of the final sentence, was a judgment having the attributes of a sentence. Therefore, it was held to be an appealable order.

CLARE DEWITT RUSSELL

CIVIL PROCEDURE

Jurisdiction of Common Pleas Courts

What would appear to be a limitation upon the jurisdiction of common pleas courts was established in a decision of the court of appeals in *Service Transport Co. v. Matyas*.¹ The plaintiff brought an action in replevin in the common pleas court against the administratrix of a decedent's estate to recover certain personal property that the decedent held as bailee for the plaintiff. The court explicitly stated that the only question before it was whether a petition in a replevin action against an administratrix which does not allege that the petitioner has presented his claim to the administra-

¹⁸ A. DiCillo & Sons v. Chester Zoning Board of Appeals, 158 Ohio St. 302, 305, 109 N.E.2d 8, 10 (1952).

¹⁹ 91 Ohio App. 489, 108 N.E.2d 854 (1952).

trix and that it has been rejected, or that if such course were followed such action would be unavailing, states a good cause of action. The court held that it does not.

The court relied upon Section 10501-53 of the Ohio General Code as giving the probate court exclusive jurisdiction to direct and control the conduct and settle the accounts of executors and administrators and to order distribution of assets, and upon Section 10509-138 as forbidding suits against such fiduciaries by a creditor or any other party interested in the estate until after nine months except in five specified types of cases, of which replevin was held not to be one. It analogized the situation before it to the facts in *Lingler v. Wesco*² in which it was held that a chattel mortgagee's rights to recover the mortgaged property in the custody of an administrator by replevin action could not be pressed in the common pleas court. In that case the court stated that, while death did not impair or remove the lien, it did cut off one of the remedies which could have been pursued against the mortgagor.

Possibly the case could have been determined otherwise by taking a different view of the second category of Section 10509-138 which permits actions against the administrator to be brought in less than nine months from the time of his appointment "for the enforcement of a lien against or involving title to specific property." [Italics added]. That statutory exception had not been enacted at the time of the decision in the *Lingler* case. Although of limited application, the present case may be of importance to the practitioner since the result reached indicates that the common pleas court has no jurisdiction over the action of replevin against an administrator.

Survival of Actions

In *Lewis v. St. Bernard*³ the supreme court satisfactorily resolved an apparent conflict between the factual situation therein presented and a prior case, *Cardington v. Fredericks*,⁴ by its construction of Sections 11235, 11397 and 11401 of the Ohio General Code. The *Cardington* case had held that an action against a municipal corporation under the provisions of Section 3714 of Ohio General Code (then Section 5144, Revised Statutes) for personal injuries suffered due to its failure properly to maintain a public street, sounded in nuisance, and abated with the death of the injured plaintiff prior to trial of an action commenced by her after injury. The court correctly

¹ 108 N.E.2d 741 (Ohio App. 1952).

² 79 Ohio St. 225, 86 N.E. 1004 (1908).

³ 157 Ohio St. 549, 106 N.E.2d 554 (1952).

⁴ 46 Ohio St. 442, 21 N.E. 766 (1889)

⁵ OHIO GEN. CODE § 11397 The amendment added the words "Unless otherwise provided. "

pointed out that since the date of the *Cardington* case, Section 11397 had been amended⁶ so as to permit the application of section 11235 which "causes of action for injuries to the person shall survive." Thus an action for personal injuries based on nuisance can survive the plaintiff's death under provisions of Section 11401. Although not expressly overruled, the *Cardington* case appears now to have become of historical interest only.

Service of Process

In *Meeker v. Werner*⁶ the court of appeals held that the provisions of Section 6308 of the Ohio General Code pertaining to service of process upon a defendant who resides in a county other than that in which the action is brought by virtue of the venue provisions of Section 6308 in an action arising out of the use of a motor vehicle in Ohio requires that such process be served by the sheriff of the county in which the defendant resides. Service by the sheriff of the county in which the action is brought, or the bailiff of the municipal court, will not, in the absence of some kind of waiver or general appearance by such a defendant, afford a basis of jurisdiction for the trial court to render judgment against him.

Joinder of Defendants

The Ohio Supreme Court in *Meyer v. Cincinnati Street Ry.*⁷ was again faced with the problem of what constitutes proper joinder of defendants. Ohio General Code Section 11255 states that "any person may be made a defendant who has or claims an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination or settlement of a question involved therein." The court stated that where an injury is proximately caused by the independent but concurrent wrongful acts of two or more persons, joint liability arises, and the wrongdoers may be joined as defendants, even though they have not acted in concert in the carrying out of a common purpose. Furthermore, joinder will not be precluded even though the want of care of such defendants is not of the same character. Thus, the court expressly overruled the doctrine established in *Stark County Agricultural Society v. Brenner*⁸ that, "joint liability for tort only lies where wrongdoers have acted in concert in the execution of a common purpose and where the want of care of each is of the same character as the want of care of the other."

Statute of Limitations

Despite the elementary principle of tort law that no matter what breaches *B* may commit of a duty to *A*, no liability results until *A* suffers

⁶ 89 Ohio App. 520, 103 N.E.2d 296 (1951).

⁷ 157 Ohio St. 38, 104 N.E.2d 173 (1952).

⁸ 122 Ohio St. 560, 172 N.E. 659 (1930).

injury from the act or omission which constituted the breach of duty, the question of when a cause of action accrues for malpractice by a physician often has proved troublesome. In *DeLong v. Campbell*⁹ the supreme court again was faced with the malpractice issue.

The case decided, probably with finality in Ohio unless the legislature should amend Section 11225 of the Ohio General Code, that an action against a physician by his patient for malpractice does *not* accrue at the time of discovery of the forgotten sponge, scalpel or tube that the doctor leaves inside his unconscious patient. Whether the cause of action accrues at the time of the delict or at the time when treatment of the patient by the physician ends (which, of course, may be much later than the date of the operation) is in the opinion of the writer still unsettled in Ohio. The court is probably at present favoring the theory that continued treatment of a patient after an operation which has been, unknown to the patient, improperly performed will extend the statute.

Pleading a Statutory Cause of Action

It is seldom at this late date in the development of the law of code pleading that a court has an opportunity to decide an issue exclusively concerned with pleading. In *In re Single Country Dutch*,¹⁰ the Ohio Supreme Court enunciated, apparently for the first time in Ohio, the rule already well established in many code jurisdictions, that when a plaintiff substantially relies upon a statute to constitute his cause of action, and the statute contains a true exception, he must plead the exception, and, of course, carry the burden of proving compliance with it. If, however, the exculpatory language of the statute is in the form of a "proviso," the matters to be established under it are defensive in character, and must be alleged and proved by the defendants. In the particular case the court found the words of Section 6486 of the Ohio General Code to be of the defensive type and excused the plaintiff from the duty of having to allege and prove his compliance with them.

Notice of Appeal

In a case of first instance in Ohio the court of appeals in *Schutt v. Blankenship*¹¹ held that Ohio General Code Section 11297-1 providing for service of writs and process by mail is not applicable to service of notice of appeal. Letters *mailed* to the trial court and to the appellate court prior to the expiration of the 20 day period for filing notice of appeal did not meet the requirements of section 12223-7 of the Ohio General Code. While the

⁹ 157 Ohio St. 22, 104 N.E.2d 177 (1952)

¹⁰ 157 Ohio St. 446, 105 N.E.2d 873 (1952)

¹¹ 107 N.E.2d 218 (Ohio App. 1951).

case could probably have been equally well decided on the basis that mailing was not the equivalent of filing, the decision is in line with authority elsewhere.

Foreign Corporation: Service Upon

The problem of due process with respect to the exercise of jurisdiction by state courts over foreign corporations doing business in a state confronted the supreme court in *Perkins v. Benguet Consolidated Mining Co.*¹² In a prior hearing before the supreme court,¹³ that court upheld the court of appeals in granting the motion of the defendant foreign corporation to quash the service of summons upon the defendant in an action brought by a nonresident upon a claim which did not arise out of the company's doing business in Ohio nor was related to its activities here. Service of process had not been made upon a designated statutory agent since the corporation had designated none but upon its "president and general manager."

Certiorari was granted by the United States Supreme Court and upon hearing on the merits that court held that the Fourteenth Amendment to the United States Constitution left the Ohio court free to determine whether it would take jurisdiction over the foreign corporation.¹⁴

Upon remission, the Supreme Court of Ohio in the principal case¹⁵ overruled its previous decision in the case. Thus it held that in the absence of a statute limiting jurisdiction of Ohio courts to causes of action arising within this state¹⁶ a suit on a transitory cause of action may be maintained in the courts of this state by a nonresident against a foreign corporation doing business here, although the cause did not arise here or relate to the corporation's business transacted here.

Garnishment: Restriction of Statutory Right

In *Marquis v. New York Life Insurance Co.*¹⁷ the court of appeals had before it a case which appears to be of first instance in Ohio on its facts. A divorced wife sought to enforce against an insurance company which had insured her divorced husband's life a judgment indebtedness which she held against her former spouse. The policy had a cash surrender value of \$733.43, but there was no evidence that the insured debtor had surrendered

¹² 158 Ohio St. 145, 107 N.E.2d 203 (1952).

¹³ *Perkins v. Benguet Consolidated Mining Co.*, 155 Ohio St. 116, 98 N.E.2d 33 (1951).

¹⁴ *Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437, 72 Sup. Ct. 413 (1951).

¹⁵ See note 12 *supra*.

¹⁶ E.g., the venue provisions which led to such a result in *Loftus v. Pennsylvania R.R.*, 107 Ohio St. 352, 140 N.E. 94 (1923)

¹⁷ 92 Ohio App. 389, 108 N.E.2d 227 (1952).